

STATE OF SOUTH DAKOTA)
 :SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

DEBORAH MCISAAC,

49CIV23-001333

Plaintiff,

v.

**PLAINTIFF’S REPLY BRIEF TO
OPENING BRIEF OF INTERVENOR
ON SUFFICIENCY OF GROUNDS FOR
PETITION FOR RECALL**

CITY OF BAL TIC,

Defendant.

Plaintiff, Mayor Deborah McIsaac (“Mayor McIsaac”), submits this reply brief to the Opening Brief of Intervenor South Dakotans for Transparent Government (“SDTG”) on Sufficiency of Grounds for Petition for Recall. In its brief, SDTG raises two arguments in its opposition to Mayor McIsaac’s request for Declaratory Judgment. (Opening Brief of Intervenor on Sufficiency of Grounds for Petition for Recall (“Intervenor’s Brief”) at 3). First, SDTG argues that declaring the Petition (attached as Exhibit A to the Complaint) to be valid protects the will of the electorate and, therefore, is in the public interest. (Intervenor’s Brief at 3–6). Second, SDTG argues that the grounds for removal in the Petition satisfy the specificity requirement of SDCL 9-13-30. (Intervenor’s Brief at 3, 6–10). Both arguments fail to show that the Petition complies with SDCL 9-13-30 and that the recall election should be held. The Court should declare the Petition fails to comply with South Dakota law and is invalid.

I. SDCL 9-13-30 is controlling and requires a “specific statement of the grounds on which removal is sought.”

SDTG argues that a declaration that the Petition is valid would protect the will of the people. (Intervenor’s Brief at 3–6). Therefore, SDTG argues that public policy supports a declaration that the Petition is valid. (Intervenor’s Brief at 3–6).

Yet, the plain language of SDCL 9-13-30 is dispositive. *In re Est. of Howe*, 2004 SD 118, ¶ 41, 689 N.W.2d 22, 32 (“The intent of a statute is determined from what the legislature said, rather than what the courts think it should have said.”); *Reck v. S. Dakota Bd. of Pardons & Paroles*, 2019 SD 42, ¶ 11, 932 N.W.2d 135, 139 (“[T]he starting point when interpreting a statute must always be the language itself.”); *State v. Bariteau*, 2016 SD 57, ¶ 15, 884 N.W.2d 169, 175 (“Our interpretation of a statute begins with an analysis of its plain language and structure.”). Therefore, the Court should enforce the plain language of SDCL 9-13-30 before considering public policy arguments. *See id.*

Moreover, in support of its public policy argument, SDTG relies on cases that are materially different than the present case. SDTG cites authority stating that courts should enforce the *outcomes* of elections because such outcomes express the will of the people. (Intervenor’s Brief at 3–6) (*citing Sorenson v. Rickman*, 486 N.W.2d 259, 262 (S.D. 1992) (stating that once an election is held and “the will of the voters can be ascertained” from the election results, “courts should uphold the will of the voters”)), (citing also *Schmitt v. McLaughlin*, 275 N.W.2d 587, 592 (Minn. 1979) (refusing to overturn election results when the winning candidate violated an election statute but that candidate acted in good faith and the violation did “not appear . . . [to be] a factor in the [candidate’s] victory”)), (citing also *Town of Nasewaupee v. City of Sturgeon Bay*, 431 N.W.2d 699, 701 (Wis. Ct. App. 1988) (refusing to overturn election results on an annexation referendum when the ballot format “substantially complied” with state statute and the election

results “clear[ly] express[ed] . . . the will of the electors”), (citing also *Stahovic v. Rajchel*, 363 N.W.2d 243, 246 (Wis. Ct. App. 1984) (simply stating the “fundamental principle that, in construing election laws, the will of the electorate is to be furthered”). Nonetheless, SDTG argues that these cases are applicable for the general proposition that the will of the voters should be protected. (Intervenor’s Brief at 3–6).

Yet because an election—clearly expressing the will of the public—has not occurred in the matter *sub judice*, these cases are inapplicable. Here, a judgment that the Petition is valid would not further the will of the electorate as a whole, but would only express the desires of those who signed the Petition. More importantly, it is the statutes in effect, enacted by the Legislature, that set forth the will of the people. Here, public policy is the language set forth in SDCL 9-13-30 that requires recall petitions to provide a “specific statement of the grounds of the recall petition” and specifically authorizes the court, upon request, to pass on the validity of a petition before an election. SDCL 9-13-30; *see Abata v. Pennington Cnty. Bd. Of Commissioners*, 2019 SD 39, ¶ 18, 931 N.W.2d 714, 721 (stating the rules of statutory construction).

Next, SDTG argues that recall statutes, such as SDCL 9-13-30, should be liberally construed. (Intervenor’s Brief at 5). In support, SDTG cites the Nebraska Supreme Court in *Quigley v. Lebsack*, in which the Nebraska Supreme Court states, “election statute[s are] liberally construed to effectuate the purpose for which the statute is intended” under Nebraska law. *Quigley v. Lebsack*, 219 Neb. 110, 112, 362 N.W.2d 31, 33 (1985).

However, South Dakota law does not require liberal construction of election statutes, and even if it did, liberal construction cannot cause a court to ignore the statutory requirements of a petition for recall. In *Quigley*, the Nebraska Supreme Court admonished that, although election statutes are interpreted liberally in Nebraska, “liberal construction” of those statutes “*does not*

constitute a license to totally ignore the express requirements of recall statutes.” Id. (emphasis added); *see also State ex rel. Palmer v. Hart*, 655 P.2d 965, 968 (Mont. 1982) (“Where the basis for the procedure [of an election recall process] is purely statutory, as here, failure to comply with the recall statutes is fatal to any recall attempt. . . . [T]o liberally construe the statutes governing the exercise of the power to recall does not constitute a license to totally ignore the requirements of those statutes.”); *Hazelwood v. Saul*, 619 P.2d 499, 501 (Colo. 1980) (“To liberally construe the statutes governing the exercise of the power to recall is not to ignore entirely the requirements of those statutes.”). The text of SDCL 9-13-30 controls, that SDCL 9-13-30 requires a “specific statement of the grounds of the recall petition.” SDCL 9-13-30.

II. The Petition is invalid for insufficiency of “the specific statement of the grounds of the recall petition.”

SDTG argues that the grounds for removal stated in the Petition “are specific enough to satisfy” SDCL 9-13-30. (Intervenor’s Brief at 6). SDTG does not cite any controlling authority from South Dakota. Instead, it relies entirely on appellant court cases from other states. (Intervenor’s Brief at 6–10). Moreover, the cases relied upon by SDTG are inapposite as they interpret statutes that, unlike SDCL 9-13-30, **do not** require recall petition to state reasons for recall with *specificity or particularity*. As such, the authority relied on by SDTG is inapplicable and unpersuasive.

SDTG cites the Massachusetts appellate court in *King v. Shank*, 96 N.E.3d 181 (2018), and *Mieczkowski v. Bd. of Registrars of Hadley*, 756 N.E.2d 1190 (2001), for the proposition that a recall petition need only include a **general reason** for recall without any specific factual allegations. (Intervenor’s Brief at 6–7). However, those cases turned on an interpretation of a Massachusetts statute, which only required a recall petition to include a “reason of lack of fitness, incompetence, neglect of duties, corruption, malfeasance, misfeasance, or violation of oath,”

accompanied by a supporting affidavit “containing the name of the officer sought to be recalled **and a statement of the grounds for recall.**” *Mieczkowski*, 756 N.E.2d at 1191 (2001) (emphasis added); *Shank*, 96 N.E.3d at 186-87. Because the Massachusetts statute only required a petition to have a supporting affidavit with “*a statement of the grounds*” for recall, the Massachusetts Appeals Court held that only a *general reason* for recall was required in recall petitions. *Mieczkowski*, 756 N.E.2d at 1192; *Shank*, 96 N.E.3d at 186-89. The Massachusetts Appellate Court’s reasoning is plainly inapplicable because, unlike Massachusetts law, SDCL 9-13-30 expressly required a “specific statement of the grounds of the recall petition.” SDCL 9-13-30.

SDTG then cites the Michigan Appeals Court’s opinion in *Molitor v. Miller*, 301 N.W.2d 532, 534 (Mich. App. 1980). (Intervenor’s Brief at 7–8). However, *Molitor* is distinguishable because it involves a Michigan statute requiring recall petitions to “*state clearly* the reason or reasons for the recall.” *Id.* (emphasis added). The South Dakota Legislature has imposed a higher threshold for recall petitions, stating that a petition “**shall contain a specific statement** of the grounds on which removal is sought.” SDCL 9-13-30 (emphasis added).

SDTG also relies on the Michigan Appeals Court in *Molitor* for the proposition that a petition containing at least one valid grounds for removal is valid, even if other grounds for removal in that petition fail to comply with the statutory requirements for recall petitions. (Intervenor’s Brief at 7–8). However, the Florida Supreme Court held such an approach was ill-conceived and could undermine the electoral process. *Garvin v. Jerome*, 767 So. 2d 1190, 1192-93 (Fla. 2000). The Florida Supreme Court reasoned that if a petition contains legally insufficient grounds for removal, it becomes all but impossible to determine whether the petition was signed for a legally sufficient reason or a legally insufficient reason. *See id.* “[P]ublic officials should not [then] face removal from the office they were lawfully and properly elected to on a ballot that

contains illegal grounds for recall in express violation of the statute.” *Id.* at 1193. Furthermore, the Michigan court’s approach would “almost certainly lead to abuse” and gamesmanship, which would undermine the electoral process. *Id.* As the Florida Supreme Court explained, “[t]o garner support for a recall petition, an astute draftsman could couple legally insufficient (but politically charged) allegations with legally sufficient (but less politically compelling) grounds. While the valid grounds might not generate support for the recall petition, the invalid grounds might. Unless, upon judicial review, a defective petition endorsed by voters is invalidated, the legitimate purposes served by the recall statute would be severely undermined.” *Id.* The Florida Supreme Court’s reasoning in *Jerome* is well-considered and should be adopted here, and the Michigan appellate court’s reasoning in *Molitor* should be rejected.

Moreover, in the present case, **none** of the five grounds for removal stated in the Petition contain a “specific statement of the grounds on which removal is sought” as required by SDCL 9-13-30. SDCL 9-13-30. SDTG argues that the number of signatures on the Petition is proof that these signers agreed with the grounds set forth in the Petition. (Intervenor’s Brief at 8–9). From that, SDTG extrapolates that, because the Petition had a sufficient number of signers under SDCL 9-13-30, the Petition must have contained sufficiently specific grounds for removal. (Intervenor’s Brief at 8–9). Yet SDTG’s argument is circular and inconsistent with South Dakota law. A court cannot infer the contents of a petition merely by looking to the number of signers, and it is contrary to the express statutory language of SDCL 9-13-30—requiring a “specific statement” of the grounds for removal—to hold that a petition may be declared valid based only on the number of signers thereof. Additionally, under SDCL 9-13-30 and the majority view of other states, a court must look to the face of the Petition to determine whether the Petition states the grounds for removal with sufficient specificity or particularity. *See* SDCL 9-13-30 (providing a petition for

recall may be challenged only for the “filing of the recall petition *or the sufficiency of the specific statement of the grounds of the recall petition*” (emphasis added)); *Unger v. Horn*, 732 P.2d 1275, 1278 (Kan. 1987) (“A majority of those states which have considered the sufficiency of allegations in recall petitions have held that the truth or falsity of such grounds must be determined by the electors, not the courts.”); *von Stauffenberg v. Comm. for Honest & Ethical Sch. Bd.*, 903 P.2d 1055, 1060 (Alaska 1995) (“[I]t is not [the court’s] role, but rather that of the voters, to assess the truth or falsity of the allegations in [a] petition” for recall.); *Gilbert v. Morrow*, 277 So. 2d 812, 814 (Fla. Dist. Ct. App. 1973) (same). Finally, SDTG’s argument relies on the faulty assumption that people only sign documents they have read, understood, and agreed with.

The majority view has held that, to meet “specificity” and “particularly” requirements of recall petition statutes, a petition must identify the *acts or omissions* giving rise to the allegations named therein. *See, e.g., Beckstrom v. Kornsi*, 217 N.W.2d 283, 288 (Wis. 1974) (holding that, where state law requires “reasons for recall [to] be stated clearly” in a petition, the petition must identify “*some act or failure to act* which in the absence of justification would warrant the recall” (emphasis added)); *Chandler v. Otto*, 693 P.2d 71, 74 (Wash. 1984) (stating that, to be “factually sufficient” under Washington law, a recall petition, while it “may contain some conclusions,” must “state sufficient facts to identify to the electors and to the official being recalled *acts or failure to act which without justification would constitute a prima facie showing of misfeasance, malfeasance, or a violation of the oath of office*” (emphasis added)); *Reynolds v. Figge*, 19 P.3d 193, 200 (Kan. App. 2001) (requiring a recall petition to state with grounds for removal with specificity).

None of the five “actions” in the Petition identify the discrete acts or omissions giving rise to each allegation but rather make general allegations. (Petition). Grounds for Removal #1 and #5

state that Mayor McIsaac “harass[ed]” and/or “threaten[ed]” city employees or members of the public. (Petition). But these Grounds for Removal fail to identify the actions constituting such harassment or threats, the specific recipients of the alleged harassment, the time such harassment occurred, or the nature of such harassment and/or threatening behavior. (Petition). *See* S.D. Op. Att’y Gen. 16 (1983), 1983 WL 180589 (stating allegations a mayor “harassed and intimidated residents” did not provide “specific” grounds for removal under SDCL 9-13-30). Grounds for Removal #2 fails to identify the acts or omissions that were an “improper use of city property/funds,” but merely alleges that funds were used improperly at a “press conference” or “campaign event.” (Petition). Grounds for Removal #3 states that Mayor McIsaac failed to disclose “public information” related to a city development project and litigation, but does not identify when, where, or how such an omission occurred, how it was improper, or the specific content of the information that is alleged to have been improperly concealed. *See* S.D. Op. Att’y Gen. 16 (1983), 1983 WL 180589 (stating “naked assertions simply do not satisfy the statutory requirement[s]” of SDCL 9-13-30). And Grounds for Removal #4 states that Mayor McIsaac failed to disclose a potential conflict of interest and misused her office without identifying any specific acts or omissions in support thereof.

Conclusion

Under the majority rule, the Petition, at the minimum, must identify the specific acts or omissions forming the basis of the allegations. While recall petitions are not necessarily required to name the exact time, place, and parties implicated in each act or omission forming the grounds for removal, under the majority view, SDCL 9-13-30 requires a sufficient description of the acts or omissions underlying allegations in a petition to provide notice to the official subject to recall of the charges against her and to give the signers of a petition notice of the issues in an upcoming

